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SUPREME COURT, U. S.

No. 94

In the Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA,
Appellant,

vs.

EL PASO NATURAL GAS COMPANY, et al.,
Appellees.

On Appeal from the United States District Court for the District of Utah

Motion for Leave to File Brief and Brief Amicus Curiae in Support of Jurisdictional Statement of the United States of America

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TABLE OF CONTENTS

	Page
Motion for Leave to File Brief Amicus Curiae in Support of Jurisdictional Statement of the United States of America	1
Affidavit in Support of Motion	3
Brief Amicus Curiae in Support of the Jurisdictional Statement of the United States of America	5

TABLE OF AUTHORITIES

Cases	Pages
California v. Federal Power Commission, 369 U.S. 482 (1962)	2, 3, 6, 8
Panhandle Eastern Pipe Line Company, 169 F.2d 881 (D.C. Cir., 1948), cert. denied 335 U.S. 854 (1948)	7

Statutes	
Clayton Act (Act of October 15, 1914, c. 323, 38 Stat. 730, 15 U.S.C. § 12, et seq.)	9
Natural Gas Act (Act of June 21, 1938, c. 556 52 Stat. 821, 15 U.S.C. § 717, et seq), Section 7 (g) (56 Stat. 84; 15 U.S.C. § 717f (g))	7

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 944

UNITED STATES OF AMERICA,
Appellant,

vs.

EL PASO NATURAL GAS COMPANY, et al.,
Appellees.

Motion for Leave to File Brief Amicus Curiae in Support of Jurisdictional Statement of the United States of America

Comes now the State of California (California) by its Special Counsel, William M. Bennett, and requests leave to file a brief *amicus curiae* in support of the United States of America, appellant, for the below stated interest of the *amicus curiae*.

INTEREST OF AMICUS CURIAE

California consumers of natural gas rely upon El Paso Natural Gas Company (El Paso) for approximately three quarters of their needs. The decision of the United States District Court for the District of Utah, from which this appeal is being taken, directly affects these present needs as well as the future requirements of the ever growing California natural gas market.

California was an intervenor in the proceeding before the Federal Power Commission wherein El Paso received administrative authorization to acquire the assets of Pacific Northwest Pipeline Corporation (Pacific). This Court, upon petition for certiorari initiated by California, reversed the decision of the Federal Power Commission. *California v. Federal Power Commission*, 369 U.S. 482 (1962). The same interests which prompted California to participate in the prior proceeding also induce California to support the Government's appeal from the District Court's decision.

The decision of the District Court, by dismissing the Government's complaint against the merger of El Paso, the giant interstate pipeline company, with Pacific, its competitor for the California market, has greatly weakened the protection provided the consumers of the nation by the Federal Anti-trust Laws.

California submits that it has a direct, immediate and substantial interest in this matter which is not represented by other parties.

For these reasons, California respectfully requests leave to file the attached brief *amicus curiae*.

Respectfully submitted,

WILLIAM M. BENNETT
Special Counsel for the State of California

AFFIDAVIT IN SUPPORT OF MOTION

State of California
City and County of San Francisco—ss.

William M. Bennett, being first duly sworn, deposes and says:

1. That he is the Special Counsel of the State of California appointed as such by the Governor of the State of California, Edmund G. Brown, and by the Attorney General of the State of California, Stanley Mosk, to represent California in all proceedings arising out of the stock acquisition and merger of the Pacific Northwest Pipeline Corporation and the El Paso Natural Gas Company.

2. That as Special Counsel the affiant represented the State of California before the Federal Power Commission, before the United States Court of Appeals for the District of Columbia Circuit, and before the Supreme Court of the United States of America in those proceedings designated *California v. Federal Power Commission*, 369 U.S. 482 (1962).

3. That California, although not a party to the proceeding in *United States of America v. El Paso Natural Gas Company* and *Pacific Northwest Pipeline Corporation*, Civil Action No. C. 143-157 in the United States District Court, District of Utah, Central Division, nonetheless maintains its great interest in such proceeding.

4. Affiant states that California views with favor the appeal from the judgment of the lower court in such proceeding and the affiant intended heretofore to request permission of this Court for the filing of a brief in support of the Jurisdictional Statement filed herein by the Government.

5. Affiant states, however, that he was required to be in attendance before the Supreme Court of the United States to make oral argument in that proceeding entitled *Wisconsin, et al., v. Federal Power Commission, et al.*, Nos. 72, 73 and 74,

October Term, 1962, during the early part of January, 1963. During that period affiant became seriously ill with bronchial pneumonia visited upon him in the opinion of a medical expert by the harsh climate of Washington, D.C. Affiant was most seriously ill, requiring constant medical attention and care for a period of approximately six weeks, following which a period of complete rest was prescribed. Only recently did affiant return to his duties and only recently has affiant obtained copies of the Jurisdictional Statement filed in this proceeding by the Government.

Accordingly, affiant requests of this Court that it excuse the failure to file the motion and supporting brief herein until now, and affiant requests that the court take into consideration the physical inability to do so until this date.

WILLIAM M. BENNETT
Special Counsel for the State of California

Subscribed and sworn to before me on May 10, 1963.

GORDON B. DIXON
Notary Public in and for said County and State.
My Commission Expires November 9, 1966

[Seal]

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UNITED STATES OF AMERICA,
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Brief Amicus Curiae in Support of the Jurisdictional Statement of the United States of America

PRELIMINARY STATEMENT

California adopts as though set forth herein that portion of the Jurisdictional Statement of the United States of America, appellant, filed in this cause wherein is set forth the Opinion Below, the Jurisdiction, the Question Presented, the Statute Involved and the Statement of Facts.

At such time as the Court notes jurisdiction herein, California will then set forth its own factual narration relevant to this appeal as well as its own compelling reasons in support of the position of the Government herein.

THE SPECIAL INTEREST OF THE STATE OF CALIFORNIA

This case comes to the Supreme Court again after the determination of this Court in *California v. Federal Power Commission*, 369 U.S. 482 (1962). In that case the Court recognized the validity of the position California had long urged as to the disability of the Federal Power Commission to approve this particular transaction. The position of California in opposition to the assumed jurisdiction by the Federal Power Commission was prompted by its grave concern for the consequences of creating and perpetrating upon California and the entire West a merger which would result in an irrevocable monopoly.

THE DEPENDENCE OF CALIFORNIA AND THE WEST UPON NATURAL GAS

California and the West are uniquely dependent upon natural gas as a source of energy. California, particularly, lacking coal deposits and the use of fuel oil being impracticable, if not illegal because of air pollution laws, is almost totally dependent upon this form of energy. Because California does not rank as one of the major producers of oil and gas it must import this energy fuel. The growth of California and the growth of its energy requirements have made the El Paso Natural Gas Company the largest of the natural gas pipelines sharing this place from time to time with the Tennessee Natural Gas Company. El Paso dominates the gas markets of the West. The judgment approving this merger further tightens and makes absolute this monopoly condition. The judgment of the court below hands to El Paso forevermore the privilege of being the dominant supplier of natural gas to the West. It requires little imagination to predict that unless this merger be set aside for the social and economic vice that it is, El Paso will have been given a license to assert its full monopoly power over sources of supply, over possible and potential competitors, all to the further aggrandizement of its

own great position and to the detriment of the gas consumers of the West. The giving of such a power must not be lightly considered particularly in view of the fact that Congress never intended that a monopoly should exist as to natural gas companies. See Section 7(g) of the Natural Gas Act*; *Panhandle Eastern Pipe Line Company v. Federal Power Commission*, 169 F.2d 881, 883-884 (D.C. Cir., 1948), cert. denied 335 U.S. 854 (1948).

CALIFORNIA'S GROWTH AND NATURAL GAS

The expected population growth of California is a matter of common knowledge. The expected population growth of the West is likewise a matter of common knowledge. The industrial and commercial growth which will accompany such increase will demand more and more natural gas for energy. It is the position of California that its energy needs now and in the future will be far better served in terms of gas availability and in terms of just and reasonable rates if the benefits of competition are retained or permitted. This merger, in the judgment of California, effectively forecloses real competition.

Already the stock acquisition and merger of Pacific by El Paso has had its harmful impact upon California. The Pacific pipeline could have been operated as an independent natural gas pipeline. In view of the fact that its route from Canada into the Pacific Northwest ran to the City of Portland, Oregon, it would have been quite feasible to extend the Portland line down to or into California. Such a proposal, in fact, as the record herein will show, was discussed and California, itself, as a State, through this counsel on behalf of the Attorney General of the State of

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*Section 7(g) of the Natural Gas Act (56 Stat. 84; 15 U.S.C. § 717f (g)) provides as follows:

"Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company".

California, made serious efforts and conducted serious negotiations to that end. In the midst of such negotiations El Paso acquired the controlling interest of Pacific thus causing the termination of such negotiations. This was the first act of the monopolists to keep California as its private preserve.

Even presently El Paso is opposing new supplies of natural gas to California from other sources. Transwestern Pipeline Company is today seeking authority from the Federal Power Commission to sell a firm supply to certain California natural gas distributing companies. *Transwestern Pipeline Co.*, FPC Docket No. CP 63-204. The gas is available and the customers are willing to buy, but El Paso is opposing the project. This is evidence of El Paso's constant activity directed toward domination of the California market.

THE CONTINUING INTEREST OF CALIFORNIA

California today maintains the same strong opposition to the merger of these two pipeline corporations as it has since the inception of the stock acquisition negotiations. California originally based its opposition to such a merger on a strong conviction and belief that it violated the monopoly laws of the United States of America and California takes the same position today. The reasons beyond the principal ones here given will not be articulated at this time but the attention of the Court is directed to the previous proceedings in *California v. Federal Power Commission*, 369 U.S. 482, (1962) and the briefs of California therein.

CONCLUSION

Wherefore California states that because of the grave economic consequences inherent in this case and because it presents the first instance as to the relevancy of the Clayton Act* to two major natural gas companies, that the Court should note jurisdiction herein. The question presented is substantial, it is of public importance and it presents the last opportunity to undo the harmful consequences already visited upon a great body of the nation's gas consumers as well as to prevent future harm to them.

Respectfully submitted,

WILLIAM M. BENNETT
Special Counsel for the State of California

*Act of October 15, 1914, c. 323, 38 Stat. 730; 15 U.S.C. § 12, et seq.